

Fair Political Practices Commission
MEMORANDUM

To: Chairman Randolph, Commissioners Blair, Downey, Huguenin, and Remy

From: William J. Lenkeit, Counsel, Legal Division
John W. Wallace, Assistant General Counsel
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Date: August 12, 2005

Subject: Adoption of Proposed Amendments to the Post-Employment “Permanent Ban”
under Regulation 18741.1 — Definition of Supervisory Authority

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I. EXECUTIVE SUMMARY

The proposed amendments to regulation 18741.1 relating to the “permanent ban” on post-employment activities are presented in order to add conforming language to this regulation as a result of the Commission’s *In re Lucas* Opinion, (2000) 14 FPPC Ops. 15. The proposal also seeks to clarify in what matters a supervisor is deemed to have participated as a result of the proceeding being “under his or her supervisory authority.”

Currently, regulation 18741.1(a)(4) provides that a supervisor “is deemed to have participated” in any matter that was (1) pending before the official’s agency and (2) is under his or her supervisory authority. The regulation does not define what is considered “a proceeding under the supervisor’s supervisory authority.”

The proposed regulatory amendment would define “proceedings under the supervisor’s supervisory authority” as those in which the supervisor has (A) duties that include primary responsibility within the agency for directing the operation or function of the program where the proceeding is initiated or conducted; or (B) directly supervises the person performing the investigation, review, or other action involved in the proceeding including, but not limited to, assigning the matter for which the required conduct is taken; or (C) reviewed, discussed, or authorized any action in the proceeding; or (D) made any contact with any of the participants in the proceeding regarding the subject of the proceeding.

The proposed regulatory amendment also provides that generally “supervisory authority” does not include a supervisor, at a higher level within the agency’s chain-of-command with responsibility for the general oversight of the administrative actions or functions of a program where the responsibilities concerning the specific or final review of the proceeding are expressly delegated to other persons in the agency’s structure unless the higher level supervising official has actual involvement in the proceeding.

III. STATUTES & AFFECTED REGULATION

Sections 87401¹ and 87402 provide:

“No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

“(a) The State of California is a party or has a direct and substantial interest.

“(b) The proceeding is one in which the former state administrative official participated.”

(Section 87401.)

“No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.”

(Section 87401.)

Regulation 18741.1 clarifies the statute as follows:

“(a) The prohibitions of Government Code Sections 87401 and 87402 apply to any state administrative official if all of the following criteria are met:

“(1) The official has permanently left state service or is on a leave of absence.

“(2) The official is compensated, or promised compensation, for making an appearance or communication, or for aiding, advising, counseling, consulting, or assisting in representing another person, other than the State of California, in a judicial, quasi-judicial or other proceeding. However, a payment made for necessary travel, meals, and accommodations received directly in connection with voluntary services are not prohibited or limited by this section.

¹ All references are to the Government Code.

“(3) The official makes an appearance or communication before any officer or employee of any state administrative agency for the purpose of influencing, as defined in 2 Cal. Code Regs. Section 18746.2, a judicial, quasi-judicial or other proceeding, including but not limited to any proceeding described in 2 Cal. Code Regs. Section 18202, subdivisions (a)(1) - (a)(7).

“(4) The judicial, quasi-judicial or other proceeding includes any proceeding in which the official participated personally and substantially by making, participating in the making, or influencing of a governmental decision, as defined in 2 Cal. Code Regs. Sections 18702.1 - 18702.4, but excluding any proceeding involving the rendering of a legal advisory opinion not involving a specific party or parties. Any supervisor is deemed to have participated in any proceeding which was “pending before,” as defined in 2 Cal. Code Regs. Section 18438.2, subdivision (b), the official’s agency and which was under his or her *supervisory authority* (emphasis added).

“(5) The judicial, quasi-judicial or other proceeding is the same proceeding in which the official participated.”

III. BACKGROUND

Public officials who leave state service are subject to two types of post-governmental restrictions under the Act, colloquially known as the “revolving door” prohibition and the permanent ban on “switching sides.” The first restriction is the “one-year ban” prohibiting certain state employees from communicating, for compensation, with his or her former agency for the purpose of influencing certain administrative or legislative action (see section 87406, regulation 18746.1). The second restriction is the “permanent ban” prohibiting a former state employee from “switching sides” and participating, for compensation, in any specific proceeding involving the State of California if the proceeding is one in which the former state employee “participated” while employed by the state (see sections 87401-87402, regulation 18741.1).

This regulatory project involves the second restriction, the permanent ban against “switching sides.” Specifically, it concerns the circumstances under which a *supervisor* has “participated” in a proceeding while employed in state service. In 1999, the Commission adopted regulation 18741.1, interpreting the permanent ban provisions of sections 87401 and 87402. Subdivision (a)(4) of that regulation provides that the restrictions of the permanent ban apply when the official has participated “personally and substantially by making, participating in the making, or influencing of a governmental decision.” It further provides that a supervisor is deemed to have participated in any proceeding that was “pending before” the official’s agency and was under his or her *supervisory authority*. The language regarding supervisors was incorporated from long standing Commission advice that a supervisor was considered to have participated in the proceeding if those proceedings were in his or her chain-of-command during the supervisor’s tenure at the agency. (*Sanford* Advice Letter, No. A-85-182; *Brown* Advice Letter, No. A-91-033.)

In 2000, the Commission revisited the issue in its *Lucas* Opinion. In that Opinion, the Commission indicated that the chain-of-command theory does not necessarily go all the way to the top agency officials without some degree of personal involvement in the proceeding by those officials. As a result the Commission modified the strict chain-of-command theory, stating that “where an official who is responsible primarily for creation and implementation of general policies has no such personal involvement in individual audits, the official will not be deemed to have ‘participated’ in those audits for purposes of the permanent ban.”

In so doing, the Commission distinguished the facts in *Lucas*, from those in *Brown*, in that *Brown* involved an official with direct supervisory control over the proceeding, while in *Lucas* those responsibilities were expressly delegated to others in the agency’s structure, and directed staff to amend regulation 18741.1 to more clearly reflect its analysis.²

As a result of the *Lucas* Opinion, the Commission directed staff to amend regulation 18741.1 to more clearly reflect its analysis. Staff believes that the best means to accomplish this is to provide a definition for the term “supervisory authority.” In defining this term, the language presented attempts to reflect the distinctions made by the Commission in *Lucas* and provide guidance to the regulated community in determining at what point a supervisor may be deemed to have participated in a proceeding, so as to implicate the provisions of the permanent ban.

IV. DISCUSSION AND PROPOSED REGULATORY ACTION

As noted above, regulation 18741.1(a)(4) provides that a supervisor “is deemed to have participated” in any matter that was (1) pending before the official’s agency and (2) is under his or her supervisory authority, but does not define what is considered “a proceeding under the supervisor’s supervisory authority.”

The proposed regulatory amendment (italics represent language added since the pre-notice meeting) would define “proceedings under the supervisor’s supervisory authority” as those in which the supervisor:

“(A) *Has duties that include primary responsibility within the agency for directing the operation or function of the program where the proceeding is initiated or conducted; or*

(B) *Has direct supervision of the person performing the investigation, review, or other action involved in the proceeding including, but not limited to, assigning the matter for which the required conduct is taken; or*

²Additional information regarding the background and history of the current regulation can be found in the pre-notice discussion of Amendments to the Post-Employment “Permanent Ban” under Regulation 18741.1 — Definition of Supervisory Authority (“Pre-notice Memorandum” 4/25/05) presented at the May Commission meeting.

(C) Reviews, discusses, or authorizes any action in the proceeding; or

(D) Has any contact with any of the participants in the proceeding regarding the subject of the proceeding.

“Supervisory authority” does not include *a supervisor, at a higher level within the agency’s chain-of-command than the supervisor identified in subsection (a)(4)(A) above, with responsibility for the general oversight of the administrative actions or functions of a program where the responsibilities concerning the specific or final review of the proceeding are expressly delegated to other persons in the agency’s structure (i.e. supervisors under subsection (a)(4)(A) above) unless the higher level supervising official has actual involvement in the proceeding as set forth in subsections (a)(4) (C) or (D) of this regulation.*”

At the May meeting, the language presented attempted to define “supervisory authority” in terms of either the supervisor’s *direct* supervision of the person performing the duties involved subsection (a)(4)(B), or by the supervisor’s personal involvement in the matter subsections (a)(4)(C) and (D). While there was general agreement that anyone who had direct involvement with the case under subsection (C) or contact with the participants concerning the proceeding under subsection (D) should be included, there was some confusion raised concerning what was meant by “direct” supervision.

One comment suggested changing the word “direct” to “immediate” because the word “direct,” although not intended to, may be interpreted to include everyone in the direct chain-of-command. However, a change to “immediate” would exclude the supervisor under the facts in *Brown*. It would also leave out supervisors above the immediate supervisors whose responsibilities included reviewing the specific proceeding or supervising the proceeding, contrary to the language expressed in the Commission’s *Lucas* Opinion.

In an attempt to clarify this, staff has now included the above italicized language. Subsection (A) would include the top level supervisor with primary responsibility for reviewing, supervising, or approving the action. Subsection (B) is aimed at any supervisor who has direct control over the person performing the action. Language added under subsection (D) attempt to clarify where the chain-of-command ends, drawing the line at the supervisor identified under subsection (A) so as to not include any supervisor above that level unless he or she is actually involved in the matter under subsections (C) or (D). This language was adopted from the *Lucas* Opinion.

Staff Recommendation: Staff recommends that the Commission adopt the proposed amendments to regulation 18741.1. This language clarifies the term “supervisor authority” to conform to the Commission’s Opinion in *Lucas* by identifying the point at which the chain-of-command ends, while including any supervisor with direct involvement in the handling of a specific proceeding or with the primary or direct responsibility for supervising the conduct taken in the proceeding.

Attachments:

Appendix A – Proposed Amendments to Regulation 18741.1